1986

American Salt Co., a Delaware corporation v. W.S. Hatch Co., a Utah corporation; the Public Service Commission of Utah; Brent H. Cameron; James M. Byrne; and Brian T. Stewart: Appellant's Reply Brief

Utah Supreme Court

Merlin O. Baker, Enid Greene; Ray, Quinney & Nebeker; attorneys for respondent.
Charles M. Bennett; Callister, Duncan & Nebeker; attorneys for appellant.

860048

IN THE SUPREME COURT OF THE STATE OF UTAH

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AMERICAN SALT CO., a Delaware corporation, Complainant and Appellant, vs. W. S. HATCH CO., a Utah corporation; THE PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON; JAMES M. BYRNE; and BRIAN T. STEWART, Respondents.	APPELLANT'S REPLY BRIEF Case No. 860048 (PSCU Case No. 85-192-01) Priority Category No. 9

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ON APPEAL FROM THE
PUBLIC SERVICE COMMISSION OF UTAH

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As previously noted (Appellant's Brief, p. 7; Respondent's Brief p. 1), W. S. Hatch Co. ("Hatch") filed a lawsuit against American Salt Company ("American Salt") in the Utah Federal District Court , Civil No. C-85-0128S. On March 10, 1986, Hatch filed a Motion for Summary Judgment in the federal action. On May 15, 1986, after American Salt filed its Appellant's Brief in this matter, Hatch's motion was heard by Magistrate Calvin Gould. On June 16, 1986, Magistrate Gould filed his Report and Recommendation, recommending to the Court that Hatch's Motion for Summary Judgment be denied. A certified copy of this Report & Recommendation is attached as Reply Exhibit No. 1.

Hatch's Motion for Summary Judgment was simply a restatement of the position Hatch had taken before the Public Service Commission (the "PSC") and now takes before this Court. Hatch argued that no matter how badly it may have acted, it was fully insulated from any claim or defense by

American Salt because it charged American Salt pursuant to its published general tariff rate.

Magistrate Gould, however, rejected Hatch's position.

> "A public utility cannot discriminate unjustly in its rates to consumers similarly situated or of the same class for the same service or kind of service. It is not essential that a rate be greater or less in amount in order to be improperly discriminatory, since a difference in the character of the payment or in the privileges or concessions may make it discriminatory. Although a maximum rate may lawfully be reduced, no reduction can be made which is not operative alike upon all who occupy the same class; and the mere fact that different rates for like services charged consumers similarly situated are within the maximum which a public utility may lawfully charge does not mean that there is no unlawful discrimination."

Report & Recommendation at 6, quoting 64 Am.Jur.2d, Public Utilities, § 110 (1972); emphasis in Report & Recommendation. Since American Salt alleged that Morton Salt and American Salt were facing the same emergency condition as a result of the rising of the Great Salt Lake and since Hatch hauled the same commodity for both shippers, from the same point of origin, and over the same route (until the turnoff to American Salt's plant), Magistrate Gould concluded that American Salt could prove that the prohibition under Utah law against discrimination and preferences had been breached and that

relief should therefore be granted. Accordingly, he recommended that the Court deny Hatch's Motion for Summary Judgment. Report & Recommendation, at 7-8.

ARGUMENT

POINT I

HATCH IS ILLEGALLY AND UNREASONABLY DISCRIMINATING AGAINST AMERICAN SALT

There are two requirements under Utah law which have been violated as a result of the PSC's order dismissing American Salt's complaint. First, Section 54-3-1 requires all charges by a common carrier to be "just and reasonable." Utah Code Ann. § 54-3-1 (1977). Second, Section 54-3-8 prohibits common carriers from discriminating against shippers. Utah Code Ann. § 54-3-8 (1953). That Section 54-3-1 was violated is the unavoidable result of Hatch's uncontroverted violation of Section 54-3-8. Charging vastly different rates to two shippers for the same service cannot be just and reasonable.

Hatch recognizes this. Hatch knows that if the Court compares the services provided and the fees charged Morton Salt with the services provided and the fees charged American Salt, the Court will find prohibited discrimination. What Hatch seeks to do is to divert the Court's attention from this comparison. Hatch states:

> Discrimination in tariff rates can only occur where one shipper is charged the tariff rate and another shipper is charged something other than the applicable tariff rate. There can be no discrimination where the applicable tariff rate is charged.

Respondent's Brief at 6. What Hatch is really arguing is that no discrimination is present because Hatch charged both American Salt and Morton Salt pursuant to its tariff rate -- even though the charges to Morton Salt were not based on its general tariff rate, but rather on a substantially lower exception to that rate. Thus, Hatch is suggesting that since all charges were made under its published tariff schedule, there was no discrimination.

This argument is nothing more than the "calling the sheep's tail a leg" argument. As in Abraham Lincoln's day, calling the sheep's tail a leg does not make it one. Morton Salt paid approximately $3.00 per ton for a thirty mile haul of salt from the Amax ponds. (R.114, 261, 262) Hatch is now charging American Salt $7.00 per ton for hauling the same product from the same ponds eleven miles. (R.114) If Hatch is allowed to collect the higher charge from American Salt, unlawful discrimination will occur.

This is precisely the reason Magistrate Gould denied Hatch's motion for summary judgment in the federal action.

> "A public utility cannot discriminate unjustly in its rates to consumers similarly situated or of the same class for the same service or kind of service. . . . Although a maximum rate may lawfully be reduced, no reduction can be made which is not operative

> alike upon all who occupy the same class; and the mere fact that different rates for like services charged consumers similarly situated are within the maximum which a public utility may lawfully charge does not mean that there is no unlawful discrimination."

Report & Recommendation at 6, quoting 64 Am.Jur.2d, Public Utilities, § 110 (1972); emphasis in Report & Recommendation.

Moreover, as a matter of economic reality, Hatch's general tariff rate is not applicable to the issue at hand. American Salt would never have hired Hatch to haul salt at Hatch's general tariff rate. (R.263) Between 1982 and 1985, Morton Salt hired Hatch on four separate occasions to haul salt for Morton from the Amax ponds to Morton's plant at Saltair. Not once did Morton pay Hatch's general tariff rate. Each and every time, Morton negotiated a special rate less than 50 % of Hatch's general tariff rate. (R.114, 261, 262) In this case, the exception is the only rule that makes economic sense.

Hatch is further suggesting that discrimination is permissible provided the PSC approves it. Respondent's Brief at 6 - 7. In Mountain States Legal Fn. v. Utah Pub. Serv., 636 P.2d 1047 (Utah 1981), the Court reached the opposite conclusion. In that case, the PSC issued an order granting a general rate increase to a public utility. The rate increase was spread over all customers except heads of households over

65 years of age. In reversing the PSC's order, the Court, after quoting the language of Section 54-3-8, stated:

> Thus, as between persons, public utilities are prohibited from granting any preference or advantage or subjecting any person to "any prejudice or disadvantage." As between localities or classes of service, public utitilies are prohibitied from establishing or maintaining "any unreasonable difference."

Mountain States Legal Fn., 636 P.2d at 1052; emphasis in Court's opinion. The Court went on to hold that where the PSC failed to adequately consider the basis for the distinction between heads of households 65 and over and heads of households under 65, its order could not stand. Mountain States Legal Fn., 636 P.2d at 1059. In the case at bar, the PSC has not entered any findings at all on the discrimination issue -- much less findings that would support Hatch's unreasonable discrimination against American Salt.

The PSC has both the power and the duty to order relief. Utah Code Ann. § 54-4-1 (1975); § 54-4-4 (1975); § 54-6-4 (1975); § 54-7-20 (1953). By dismissing American Salt's petition for relief and allowing prohibited discrimination to occur, the PSC breached its statutory duties. Accordingly, its order must be reversed.

POINT II

THE PSC MAY NOT ALLOW A REGULATED CARRIER TO VIOLATE A STATUTORY PROHIBITION UNDER THE GUISE OF IMPLEMENTING PUBLIC POLICY

Hatch argued in its brief that the PSC's decision in this case reflected a policy decision by the PSC to enforce published tariffs regardless of the circumstances. Respondent's Brief at 20 - 24. If the PSC's decision does in fact represent a conscious policy decision by the PSC, its decision is at variance with its duty. As this Court has recently stated: "The Commission's duty is to protect the public interest, not the entrenched rights of the industry it is charged with regulating." Milne Truck Lines, Inc. v. Public Service Commission, 36 Utah Adv. Rep. 23, 25 (June 20, 1986). The PSC's ruling protects only Hatch's efforts to collect an unreasonable and discriminatory rate from American Salt. The legislature has determined that the public needs just, reasonable and non-discriminatory rates. Utah Code Ann. § 54-3-1 (1977); § 54-3-8 (1953). The PSC may not condone a violation of Utah law under the guise of implementing public policy. When it ignores legislative directives, the PSC violates the law. Thus, its decision must be vacated.

CONCLUSION

American Salt requests that the Court order the PSC's decision vacated and that the Court remand the case for an adjudication on the merits.

Respectfully submitted this 11 day of August, 1986.

CALLISTER, DUNCAN & NEBEKER

Charles M. Bennett

CDN2798S

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of REPLY BRIEF OF AMERICAN SALT CO. were mailed postage fully prepaid, this 11 day of August, 1986 to the following:

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Charles M. Bennett

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

W. S. HATCH CO., Plaintiff, vs. AMERICAN SALT CO., Defendant.	)	Case No. C-85-0128 REPORT & RECOMMENDATION

This diversity action to collect unpaid freight charges is before the court on plaintiff's motion for summary judgment.[1] The magistrate heard arguments on the motion on May 15, 1986 at 2:00 p.m. The plaintiff was represented by Merlin O. Baker and Enid Greene; the defendant was represented by Charles M. Bennett.

Factual Background

In April of 1984, W.S. Hatch Co. hauled 406 truckloads of salt from ponds near the Great Salt Lake to Solar, Utah. The parties had agreed on an hourly rate of $59.80 per hour, but a dispute arose over the chargeable hours. Later, Hatch maintained that the haul was regulated by Utah statute because it was made, in part, over public roads. Hatch billed American Salt at the tariff rates then on file with the Utah Public Safety Commission, adding approximately $90,000 to the original bill.

[1] Defendant's motion to stay pending the decision of the Utah Supreme Court in a parallel proceeding was denied without prejudice until resolution of the motion for summary judgment.

Hatch had a similar agreement to carry salt for a competitor of American Salt. Because the route to the competitor's plant clearly involved public roads, Hatch had applied to the Commission for an exception from the tariff rates, which the Commission granted.

When American Salt refused to pay the tariff rate, Hatch commenced this action. American Salt filed a petition with the Commission, and Hatch agreed to let this action be stayed until the Commission had a chance to rule.

On September 12, 1985, the Commission dismissed American Salt's petition, holding that the tariff on file was fair and reasonable and that Hatch was legally required to charge the tariff rates and American Salt was required to pay them. The Commission also held that "any oral or written agreement[s] to charge a rate higher or lower than the public rate, even assuming that such was agreed to by Hatch and American Salt, is void and unenforceable." (Plaintiff's Exhibit "F", Report and Order at 5.)

American Salt then asked for a rehearing. Although the Commission expressed sympathy for American Salt's position, it denied a rehearing because:

> "The tariff rates must be charged and collected unless prior specific authorization from this Commission is obtained. In the event it is demonstrated that a carrier is intentionally misleading shippers to his pecuniary advantage, the Commission could and certainly would reconsider the fitness of such a carrier to hold an operating authority; however, that does not change the policy and requirement of law concerning tariffs and Complainant cannot be helped."

(Defendant's Exhibit in support of amended motion to stay; Order Denying Rehearing at 2.)

Appropriateness of Summary Judgment

Rule 56(c), Federal Rules of Civil Procedure, requires a court to grant summary judgment when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes v. Kress & Co., 398 U.S. 144, 157 (1970); Baker v. Penn Mutual Life Insurance Co., No. 84-1412, slip op. at 3 (10th Cir. Apr. 2, 1986). The moving party must "demonstrate entitlement beyond a reasonable doubt and if an inference can be deduced from the facts whereby the nonmovant might recover, summary judgment is inappropriate." Ewell v. United States, 776 F.2d 246, 249-50 (10th Cir. 1985). Also see, Cherokee Nation of Oklahoma v. United States, 782 F.2d 871, 874 (10th Cir. 1986).

In its memorandum, American Salt lists five issues of material fact which it disputes: 1) whether Hatch knew a public road was involved and acted willfully and maliciously, 2) which party was responsible for the delays in shipping salt under the contract, 3) whether the parties had an oral and/or written agreement, 4) whether Hatch would have accepted the contract rate if American Salt had not disputed its interpretation of the contract, and 5) whether an oral or written contract required Hatch to obtain any licenses or permits necessary to validate the

contract. At the hearing, American Salt also disputed whether Hatch's acts constituted an unlawful preference under the state tariff provisions.

In determining whether there are "genuine issues of material fact" in this case, we look to the substantive law of Utah. Although there is little caselaw interpreting Utah's tariff provisions (U.C.A. 54-3-1 et seq.), similar provisions are found in other states and in the Interstate Commerce Act, 49 U.S.C. §301 et seq.

The main policy behind establishing tariff rates for common carriers is to prevent unjust discrimination against passengers or shippers of property. As the United States Supreme Court explained regarding federal tariffs:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Louis & Nash. R.R. v. Maxwell, 237 U.S. 94, 97 (1915).

The language of Utah's tariff provisions shows that they were prompted by similar policy concerns:

> "No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property...than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at any time;"

U.C.A. 54-3-6(2). Public utilities (including commons carriers) are expressly forbidden to:

> "refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates ...so specified; nor extend to any person any form of contract or agreement, or any rule or regulation, or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided that the commission may, by rule or order, establish such expectations from the operation of this prohibition as it may consider just and reasonable as to any public utility."

U.C.A. 54-3-7 (emphasis added).

A properly-published tariff schedule has the force and effect of a statute, and special contracts of carriage inconsistent with its terms are void under statutes (like Utah's) which prohibit deviation. Shippers are expected to know the published rates, and it is not within the power of the parties to agree upon a different rate. Furthermore, mistake or misrepresentation by the carrier will not prevent its recovery of the full legal rate. Louis. & Nash. R.R., 237 U.S. at 97; 13 Am.Jur.2d Carriers, §§107-108 (1964). Thus, the policy against discrimination eliminates most defenses to an action by a carrier for recovery of undercharges.

A carrier's mistake in calculating rates did not prevent its recovery of the correct tariff rate, in Union Pacific R. Co. v. Sterling H. Nelson & Sons, Inc., 552 P.2d 649 (Utah 1976). That case suggests that Utah courts would follow other jurisdictions in enforcing lawful tariff rates without comprise.

Accordingly, Hatch's intent or knowledge in agreeing to a rate less than the published tariffs does not raise an issue of material fact. Courts have held that even intentional misrepresentations by a carrier are irrelevant to its recovery of tariff charges. Graves Truck Line, Inc. v. Hy Plains Dressed

Beef, Inc., 204 Kan. 275, 462 P.2d 130 (1969); Atchison, Topeka and Santa Fe Railway Co. v. Bouziden, 307 F.2d 230 (10th Cir. 1962); F. Burkehart Mfg. Co. v. Ft. Worth & D.C.R. Co., 149 F.2d 909, 910 (8th Cir. 1945).

Because special contracts inconsistent with the terms of a published tariff schedule are void under Utah law, no issues of contract law are material by way of defense. Hatch would be entitled to recover the tariff rates whether or not the parties agreed to another rate orally or in writing and regardless of any breaches of that agreement. (However, we do not reach the merits of American Salt's counterclaims which raise many of these contract issues.)

Finally, American Salt disputes whether the tariff rates were "reasonable and just under the circumstances," or whether they actually worked to discriminate against American Salt when compared to its competitor who was granted an exception from the tariffs.

The general rule is that:

> "A public utility cannot discriminate unjustly in its rates to consumers similarly situated or of the same class for the same service or kind of service. It is not essential that a rate be greater or less in amount in order to be improperly discriminatory, since a difference in the character of the payment or in the privileges or concessions may make it discriminatory. Although a maximum rate may lawfully be reduced, no reduction can be made which is not operative alike upon all who occupy the same class; and the mere fact that different rates for like services charged consumers similarly situated are within the maximum which a public utility may lawfully charge does not mean that there is no unlawful discrimination."

64 Am.Jur.2d, Public Utilities, §110 (1972)

American Salt alleges that in this case, rising waters of the Great Salt Lake created an urgent or emergency situation for salt companies operating there. Therefore, American Salt and its competitor made special contracts with Hatch for the carriage of salt. As part of those contracts, Hatch agreed to obtain whatever exceptions or licenses needed to validate the contracts. In the case of American Salt's competitor, Hatch knew that an exception to the tariff rate must be obtained from the Public Service Commission. However, in the case of American Salt, Hatch obtained no exception, either intentionally or because Hatch believed the tariff would not apply to that route. When American Salt sought an exception after the haul, the Commission ruled that any exceptions must be obtained prior to the haul. (Commission's Report & Order at 5.)

Since American Salt and its competitor are similarly situated consumers of the same class seeking the same service, American Salt argues that it is unjust discrimination for Hatch to charge one the tariff rate and the other the contract rate. Special concessions should operate alike on all who occupy the same class. Furthermore, the Utah statute permits special contracts when they are "regularly and uniformly extended to all corporations and persons" U.C.A. 54-3-7.

The state legislature specifically delegated the authority to determine questions of fact regarding preferential charges to the Public Service Commission. U.C.A. 54-3-8. Although the courts' scope of review is narrow, orders of the Commission which are without legal justification may be set aside. Mountain

States Legal Fn. v. Utah Pub. Serv., 636 P.2d 1047 (Utah 1981) [setting aside Commission's order sustaining a preferential "senior citizen rate" for electricity customers].

Viewing the facts in the light most favorable to American Salt, as we are required to do on a motion for summary judgment against it, we find genuine issues of material fact relating to American Salt's argument that Hatch's charges are unduly discriminatory or preferential. If so, the remedy suggested by the Public Service Commission would be to deprive Hatch of its operating authority, rather than to give American Salt any relief. However, we disagree that American Salt is without any remedy and that Hatch is entitled to relief as a matter of law. In view of the concessions granted to American Salt's competitor and the urgent need to haul the salt before the Lake continued to rise, the tariff might yet be found unlawful, unjust, unreasonable, or preferential, especially if the Commission's refusal to set it aside when an exception was sought after the haul is found to be arbitrary and capricious.

For these reasons, the magistrate recommends that Hatch's motion for summary judgment be denied.

Copies of the foregoing report and recommendation are being mailed to the parties. They are hereby notified of their right to file objections hereto within 10 days from the receipt hereof.

DATED this 16 day of June, 1986.

Calvin Gould
United States Magistrate

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing Report and Recommendation to Merlin O. Baker and Enid Greene, 400 Deseret Building, 79 South Main, P.O. Box 45385, Salt Lake City, Utah 84145; and Charles M. Bennett, Suite 800, Kennecott Building, Salt Lake City, Utah 84133, this 16th day of June, 1986.

B. Mumford
Clerk